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BRIEF FOR THE RESPONDENTS

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956.

No. 69

PAUL H. BREITHAUPT, PETITIONER,

vs.

MORRIS ABRAM, RESPONDENT.

On Writ of Certiorari To The Supreme Court of The State of New Mexico

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BRIEF FOR THE RESPONDENTS

STATEMENT

The Respondent has no objection to the Petitioner's statement of "Opinion Below", "Jurisdiction", "Constitutional Provisions, Statutes and Rules Involved", "Questions Presented", and "Statement".

ARGUMENT

I.

The Fourteenth Amendment does not bar the use of the result of blood test made to determine alcoholic content in a trial for Involuntary Manslaughter when blood sample tested was taken from accused while unconscious.

In subpoint A of Point I, Petitioner relies upon *Rochin vs. California*, 342 U.S. 165, claiming that this case announces the rule that "a conviction obtained by the use of evidence secured from an assault upon the person is obtained in violation of the Due Process Clause of the Fourteenth Amendment."

The Respondent in this case believes that no such ruling was intended by the *Rochin* case. In fact, we submit that the key to the understanding of this decision rests in the following language:

> "*On the facts of this case* the conviction of the petitioner has been obtained *by methods* that offend the Due Process Clause." (p. 174). (Emphasis supplied.)

When this statement is considered with the facts of the *Rochin* case, it becomes apparent that it was not just the one element of breaking into the privacy of the Petitioner. It was the overall brutality of the police officers in the *Rochin* case, which offended the "sense of justice" which is a part of Due Process. In the *Rochin* case, there was the illegal entry into the home, together with the "jumping on" the defendant when he put the capsules in his mouth to prevent the loss of the capsules. When this proved unsuccessful, the defendant was handcuffed and taken to the hospital where his stomach was pumped. Clearly, these are the facts which offended the "sense of justice." It

was the totality of the brutality of this case which is shocking and offensive.

The Petitioner attempts to bring his fact situation within the *Rochin* facts; however, even a casual examination of the facts, as outlined at pp. 2-4 of Petitioner's Brief, discloses that in the case at bar there is no element of brutality as in the *Rochin* case. In this case, there is no illegal entry into the home of the Petitioner. There is no brutal assault upon his person. All that was done was 20 cc. of blood was withdrawn by a doctor. (R. 6, 13-14, 23.) The Respondent submits that all of these facts do not disclose any situation such as in the *Rochin* case to indicate that "the conviction of the Petitioner has been obtained by methods that offend the Due Process Clause."

The Respondent believes that this Court, at p. 174 of the *Rochin* decision, excluded blood tests and similar techniques from its ruling by the following language:

> "We, therefore, put to one side cases which have arisen in State courts through use of modern methods and devices for discovering wrongdoers and bringing them to book: *It does not fairly* represent these decisions to suggest that they legalize force so brutal and so offensive to human dignity in securing evidence from a suspect as is revealed by this record."

It is to be noted that this Court refused to condemn these types of cases because they do not have the element of "brutal" force about them which is repulsive to the requirements of the Due Process Clause.

This is the construction which the California Court placed on the *Rochin* case in the case of *People vs. Haeussler*, 41 Cal. 2d 252, 260 P. 2d 8, cert. den. 347 U.S. 931. The facts in the *Haeussler* case were identical to the case

at bar and the California Court did not find that the act of taking the blood in the usual manner so brutal and shocking as to warrant the application of the *Rochin* doctrine. This California case was influential in the decision of the New Mexico Supreme Court below. (R. 9, 19, 11.) For a review of the various constructions that state courts have placed upon the *Rochin* case, see 41 *Cal. Law Rev.* 728.

The position of the Respondent in this case is that it is not uncivilized conduct to withdraw blood for a scientific test to determine the alcoholic content of blood of the Petitioner. It did not violate any of the fundamental concepts of the "community's sense of fair play and decency." It did not offend the sense of fair play and decency of the Justices of the Supreme Court of New Mexico in the case below, where the same issues were raised. (R. 5-12, inclusive.) The same type of conduct was not offensive to five of the California Justices in *People vs. Haeussler*, supra. Several other state courts have approved the withdrawal of blood samples from an accused while he was unconscious and unable to consent. *State vs. Cram*, 176 Ore. 577, 160 P. 2d 283, 164 A.L.R. 952; *Kerschbing vs. Farrar*, 114 Colo. 421, 166 P. 2d 154; *People vs. Tucker*, 88 Cal. App. 2d 333, 198 P. 2d 941; *State vs. Ayres*, 70 Idaho 18, 211 P. 2d 1942; *Hicks and Bovey vs. State*, 93 N.Y.S. 2d 560 (Ct. of Claims N.Y.); *People vs. Block*, 125 Colo. 36, 240 P. 2d 512, cert. den. 343 U.S. 978.

Another test which can be applied to determine whether the extraction of blood sample is shockingly brutal is whether the State Legislature, under its police powers, could validly require by legislation a blood test for all persons arrested for drunk driving. The validity of such a requirement would hardly be open to question. Analogous legislation has been passed under the authority

of the police power by various states. Examples are compulsory vaccination (Jacobsen vs. Mass., 197 U.S. 11); blood test prior to marriage; blood test for pregnant women; and test for venereal diseases (22 A.L.R. 1189). These statutes would indicate that these requirements are not unreasonable. It would seem clear that a state could require submission to blood tests upon arrest for drunk driving under the police power. If the legislature is so empowered, police officers have an implied power to take such samples, or at least the taking of such sample by an officer is not shockingly brutal so as to be interdicted by the *Rochin* case.

In the sanction of this activity, the New Mexico Supreme Court in no way afforded "brutality the cloak of law." The sanction of this evidence does not tend "to discredit the law." In fact, the use of this type of evidence tends to uphold the law inasmuch as it provided an accurate means of determination of a fact. The test is an aid to determining innocence as well as in determining guilt. In view of the highway slaughter and the facts that drinking drivers are a menace to highway safety, it seems that civilized society requires that scientific tests be used in any case where such will aid in the "discovering [of] wrongdoers and bringing them to book." Certainly the method of securing evidence is an important consideration and brutal shocking methods should not be sanctioned. However, this case is not one that was brutal and shocking in its method.

The Petitioner concedes that New Mexico has rejected the exclusionary rule of *Weeks vs. United States*, 232 U.S. 383, in the cases of *State vs. Barela*, 23 N.M. 394, 168 P. 545, L.R.A. 1918-B 844, and *State vs. Dillon*, 34 N.M. 366, 281 P. 474. At this date, it surely cannot be claimed that the Fourteenth Amendment requires that a state in every

case exclude evidence which is obtained in violation of some constitutional right. *Wolf vs. Colo.*, 338 U.S. 25, clearly settled the fact that the Federal evidence exclusionary rule of the *Weeks* case, supra, was nothing more than a federal rule of evidence which was not binding upon the States. This is particularly true where the claim is such that the evidence is secured in violation of the prohibition against unreasonable search and seizure. This position was affirmed in *Irvine vs. Calif.*, 347 U.S. 128.

It is likewise settled that the Fourteenth Amendment does not include the privilege against self-incrimination. *Twining v. New Jersey*, 211 U.S. 78; *Adamson v. Calif.*, 332 U.S. 46. It is therefore clear that the fact that New Mexico rejects the rule of the *Weeks Case*, supra, does not of itself violate any right of the Petitioner under the Fourteenth Amendment.

The Petitioner seeks to discredit the decision of the Supreme Court of New Mexico in this case by pointing out that this decision accepted the argument which the California Court used in *People v. Haussler*, supra, in distinguishing the fact situation there and here presented from the facts of the *Rochin Case* and then claiming that subsequently the California Court overruled the *Haeussler Case*, supra, in the case of *People v. Cahan*, 44 Cal. 2d 434, 282 P. 2d 905. Actually the California Court in the *Cahan Case*, supra, carefully points out that it is adopting a rule of evidence by the following language:

> "It bears emphasis that in the absence of a holding by the United States Supreme Court that the Due Process Clause requires exclusion of unconstitutionally obtained evidence, whatever rule we adopt, whether it excludes or admits the evidence, will be a judicially declared rule of evidence." (282 P. 2d at 910.)

The *Cahan Case*, supra, in no way overruled the *Haeussler Case*, supra, so far as the *Haeussler Case* distinguished its fact situation from the *Rochin's* facts. In fact, the *Cahan Case*, supra, emphasized the *Haeussler* analysis of the *Rochin* decision in the following language:

> "If the unconstitutional conduct of the law enforcement officers were more flagrant or more closely connected with the conduct of the trial, it is clear that the foregoing principles would compel the reversal of any conviction based thereon. Thus, no matter how guilty a defendant might be or how outrageous his crime, he must not be deprived of a fair trial, and any action, official of otherwise, that would have that effect would not be tolerated. Similarly, he may not be convicted on the basis of evidence obtained by the use of the rack or the screw or other brutal means no matter how reliable the evidence obtained may be." (282 P., 2d 912).

It is clear that all that the *Cahan Case*, supra, did was announce a new rule of evidence for the California Courts, and it overruled the *Haeussler Case*, supra, only to the extent that it was based upon the former rule followed in California.

The analysis which the *Haeussler Case* made of the *Rochin Case* is still followed in the California Courts. *People v. Woods*, ...Cal. 2d....., 293 P. 2d 901.

The Respondent submits that the distinction made by the *Haeussler Case* of the *Rochin Case* and accepted by the New Mexico Court is a valid factual distinction and it was in no way impaired by the ruling in the *Cahan Case*.

The Petitioner seeks additional comfort from the cases of *State v. Weltha*, 228 Iowa 519, 292 NW 148; *State v. Height*, 117 Iowa 650, 91 NW 935, 59 A.L.R. 427; *Apodaca*

v. State, 140 Tex. Cr. 593, 146 SW 2d 381; *Turvey v. State*, 95 Okla. Cr. 418, 247 P. 2d 304. These cases merely are examples of the exclusionary rule. They would perhaps be persuasive if the issue before the court was what evidentiary rule should be adopted. However, New Mexico had settled this question in the cases of *State v. Barela*, supra, and *State v. Dillon*, supra, and New Mexico has decided that it would not exclude evidence on the grounds that it was obtained in violation of a constitutional guaranty. The Due Process Clause of the Fourteenth Amendment does not preclude the State of New Mexico from adopting such rule of evidence. *Wolf v. Colorado*, supra. Due Process of the Fourteenth Amendment case only applies if the Petitioner can bring his case within the *Rochin* rule, and the Respondent submits that as heretofore pointed out the facts in the present case do not bring it within the rule announced in the *Rochin case*.

Under subpoint B of Point I, the Petitioner claims that he relies upon the "generative principles" set forth in the Bill of Rights, and that the court should consider these principles in determining whether Petitioner's conviction offends against the Due Process of the Fourteenth Amendment. In this instance, it seems to be the "generative principles" of the Fourth and Fifth Amendments which should be particularly considered at this time.

The Respondent would answer this claim by pointing out that the use of evidence in a state court, which many have been secured in violation of the Fourth Amendment, is not prohibited by the Fourteenth Amendment. *Wolf v. Colorado*, supra; *Irvine v. California*, supra. This very question was present in the *Rochin case*, supra, as Justice Jackson pointed out in the *Irvine case*, at p. 133, in the following language:

> "Although Rochin raised the search and seizure question, this Court studiously avoided it and never once mentioned the Wolf case. Obviously, it thought that illegal search and seizure alone did not call for reversal."

The *Rochin case*, which the Petitioner claims announces the rule upon which he relies certainly rejects this claim which he now makes.

The Respondent does not believe that a switch to the "generative principles" of the Fifth Amendment serves the cause of the Petitioner. The claim is that this evidence was in effect compulsory self-incrimination. It is settled that the Fourteenth Amendment does not embrace a right similar to that guaranteed by the Fifth Amendment. *Twining v. New Jersey*, supra; *Adamson v. California*, supra.

Historically, the self-incrimination privilege prohibited testimonial compulsion and had nothing to do with compulsory disclosure of physical condition. (See *Inbau, Self Incrimination; Morgan, The Privilege Against Self Incrimination*, 34 Minn. L. Rev. 1.) *Wigmore* in his book *On Evidence*, 3rd Ed., Vol. III, p. 362, § 2263, supports this principle as follows:

> "Looking back at the history of the privilege (ante, sec. 2250) and the spirit of the struggle by which its establishment came about, the object of the protection seems plain. It is the employment of legal process to extract from the person's own lips an admission of his guilt, which will thus take the place of other evidence."

"In other words, it is not merely any and every compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but testimonial compulsion. The one idea is as essential as the other."

This court has also followed this rule in an opinion written by Mr. Justice Holmes, *United States v. Holt*, 218 U. S. 245, 252, where it was stated:

"Another objection is based upon an extravagant extension of the Fifth Amendment. A question arose as to whether a blouse belonged to the prisoner. A witness testified that the prisoner put it on and it fitted him. It is objected that he did this under the same duress that made his statements inadmissible, and that it should be excluded for the same reasons. But the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material."

This historical view is reflected in the *American Law Institute's Model Code of Evidence* (1942): *Rule* 203 provides that any person may refuse to disclose any matter that will incriminate him, and *Rule* 205 provides as follows:

"No person has a privilege under Rule 203 to refuse (a) to submit his body to examination for the purpose of discovering or recording his corporal features and other identifying characteristics, or his physical or mental condition, or (b) to furnish or to permit the taking of samples of body fluids or substances for analysis."

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The fact that the American Law Institute Advocates such rule for its *Model Code of Evidence* should also indicate that the taking of blood samples and the use of the same is not shocking, brutal conduct which would offend against the sense of justice, which is embodied in the Due Process Clause of the Fourteenth Amendment.

In blood sample cases where the issue of self-incrimination has been raised, the courts have rejected the contention and held that the privilege did not apply. *State v. Cram*, supra; *State v. Sturtevant*, 96 N.H. 99, 70 A. 2d 909; *State v. Ayres*, supra; *State v. Alexander*, 7 N.J. 585, 83 A. 2d 441; *Block v. People*, supra; *State v. Cash*, 219 N.C. 818, 15 SE 2d 277; *United States v. Williamson*, 4 U.S.C.M.A. 320.

This contention was made in the *Rochin case* and the Court refused to base its decision on such ground. As herein pointed out, the Respondent submits that there is no merit to the contentions made in subpoint B of Point I.

II.

The Respondent joins the Petitioner in the position which he has taken in Point II. The Petitioner is now in custody and is serving the balance of the original sentence for involuntary manslaughter. The Respondent therefore concedes that this cause is not moot.

CONCLUSION

The judgment of the Supreme Court of New Mexico denying the Petitioner a Writ of Habeas Corpus is correct inasmuch as the lower court did not in any way violate any constitutional guaranty protected by the Due Process Clause of the Fourteenth Amendment. The judgment of the Supreme Court of New Mexico should be affirmed.

Respectfully submitted,

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